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ILLINOIS COMMERCE COMMISSION **STATE OF ILLINOIS**
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PRIMECO PERSONAL COMMUNICATIONS,

v.

ILLINOIS BELL TELEPHONE COMPANY
d/b/a AMERITECH ILLINOIS,

Complaint pursuant to Sections 13-514 and 13-515
of the Public Utilities Act.

CHIEF CLERK'S OFFICE

Docket No. 00-0670

REDACTED - PUBLIC VERSION

REPLY BRIEF OF
PRIMECO PERSONAL COMMUNICATIONS

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PrimeCo Personal Communications ("PrimeCo"), through its counsel, pursuant to the January 18, 2001 Order of the Hearing Examiner, hereby submits the Reply Brief of PrimeCo Personal Communications.

I. INTRODUCTION

This Docket involves a statutory claim under Section 13-514 of the Public Utilities Act (the "Act"), which prohibits telecommunications carriers from "knowingly imped[ing] the development of competition in any telecommunications service market." (220 ILCS § 5/13-514 ("Section 13-514")) Specifically, PrimeCo is seeking an order from the Illinois Commerce Commission (the "Commission") directing Illinois Bell Telephone Company d/b/a Ameritech Illinois ("Ameritech") to substantially improve the quality of the high-speed transport services Ameritech provisions to PrimeCo over DS1 circuits ("DS1 Service").

PrimeCo is entitled to relief under Section 13-514 of the Act because the DS1 Service Ameritech has provided to PrimeCo since September 1998 continually has failed to satisfy reasonable minimum performance standards established by

Ameritech, and the poor quality of Ameritech's DS1 Service is impairing PrimeCo's ability to compete in Illinois' wireless telecommunications service market. Further, the preponderance of the evidence in the record shows that: (i) Ameritech's provision of unreasonably poor quality DS1 Service to PrimeCo falls within Section 13-514's definition of conduct that constitutes a per se impediment to the development of competition in a telecommunications service market; and (ii) Ameritech is acting knowingly.

In its attempt to defeat PrimeCo's complaint, Ameritech advances two principal arguments. Ameritech argues that because it provides PrimeCo with DS1 Service pursuant to a competitive contract that took effect in 1998 (the "1998 Contract"), PrimeCo's complaint actually is a disguised and improper attempt to reform the 1998 Contract [REDACTED]

[REDACTED]. This claim fails because PrimeCo's complaint is expressly based on and authorized by Section 13-514 of the Act. Further, [REDACTED]

[REDACTED]. Accordingly, PrimeCo is not required to seek relief against Ameritech by filing an action on the 1998 Contract, which is critical in this case because [REDACTED].

For purposes of this case, the 1998 Contract simply provides a framework for reviewing Ameritech's conduct.

Ameritech also argues that the evidence in the record fails to provide a basis on which the Commission can conclude that Ameritech is knowingly impeding the development of competition in a telecommunications service market because the evidence does not establish that Ameritech discriminated against PrimeCo. This claim fails for two reasons. First, under Section 13-514 of the Act, if Ameritech

unreasonably provides inferior connections to PrimeCo or unreasonably impairs the speed, quality or efficiency of services used by PrimeCo or unreasonably acts in a manner that has a substantial adverse effect on PrimeCo's ability to provide service to its customers -- three types of conduct Section 13-514 defines as per se impediments to competition -- Ameritech is deemed to have impeded the development of competition in a telecommunication service market as a matter of law. Thus, independent proof of the fact that Ameritech is impeding competition is not necessary. Second, to prevail on its complaint, PrimeCo is not required to prove that Ameritech discriminated against it. Rather, PrimeCo need only prove that Ameritech acted unreasonably.

Accordingly, because the evidence in the record shows that Ameritech knowingly engaged in conduct constituting a per se violation of Section 13-514 of the Act, the Commission should grant PrimeCo's complaint. Further, pursuant to the express terms of Section 13-515(d)(7) and (8) of the Act, the Commission should direct Ameritech to ensure that on or before October 1, 2001, the DS1 Service it provides PrimeCo satisfies reasonable performance standards.

II. ARGUMENT

A. PRIMECO'S CLAIMS ARE NOT BASED ON THE 1998 CONTRACT

According to Ameritech, PrimeCo's request that the Commission order Ameritech [REDACTED]

[REDACTED]

[REDACTED] (See Am. Int. Br. at 11 (PrimeCo seeks [REDACTED]
[REDACTED]) and 35.) This contention is without merit.

PrimeCo is not asserting a claim based on the 1998 Contract.

PrimeCo's claim in this proceeding is that Ameritech's provision of unreasonably poor quality DS1 Service -- [REDACTED]

[REDACTED] -- violates Section 13-514 of the Act, which prohibits telecommunications carriers from "knowingly impeding the development of competition in any telecommunications service market." (See generally PrimeCo's Verified Complaint ("Complaint"); 220 ILCS § 5/13-514.) Thus, PrimeCo's claim is a statutory claim based on Section 13-514 of the Act.

Ameritech cannot reasonably dispute this fact because Ameritech itself admits that PrimeCo's Complaint does not state a breach of contract claim. (Am. Int. Br. at 4 n.2). Indeed, Ameritech expressly admits that "PrimeCo has not alleged a breach in its Complaint." (Id.) Moreover, as stated in Armstrong v. Guigler, 174 Ill. 2d 281, 291, 673 N.E.2d 290, 295 (1996) (citing Mitchell v. White Motor Co., 58 Ill. 2d 159, 162, 317 N.E.2d 505 (1974)):

it is only where liability emanates from a breach of a contractual obligation that the action may be fairly characterized as 'an action on a written contract.' The focus of the inquiry is on the nature of the liability and not on the nature of the relief sought.

Ameritech's liability on the claims asserted in this proceeding does not emanate from Ameritech's breach of the 1998 Contract. (See Am. Int. Br. at 4 n.2.) Ameritech's liability stems from its provision of unreasonably poor quality DS1 Service to PrimeCo and the impact that poor quality service has on PrimeCo's ability to compete. (See Complaint.) Accordingly, PrimeCo's Complaint does not arise under the 1998 Contract.

This conclusion is correct even though the facts that support PrimeCo's Section 13-514 claim [REDACTED]

Under well-settled Illinois law:

[REDACTED]

([REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

(See generally, Pr. Ex. 2-E.)

[REDACTED]

[REDACTED] (Id.) [REDACTED]
[REDACTED]
[REDACTED] (Id.) [REDACTED]
[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]:

[REDACTED]

(Pr. Ex. 2-E at § 14.0 (emphasis added); [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (Pr. Ex. 2-E at § 10.0.) [REDACTED]

[REDACTED]

[REDACTED] (See id.) [REDACTED]

[REDACTED] (see Am. Int. Br. at 4), [REDACTED]

[REDACTED] (Am. Int. Br. at 4 n.2), [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (See Pr.

Ex. 2-E at § 8.0.) [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (Am. Int. Br. at 33) [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

¹ [REDACTED] (Am. Int. Br. at 27-28.) [REDACTED]

[REDACTED] in Section 13-514 of the Act, the Illinois legislature expressly authorized the Commission to order a telecommunications carrier to modify its conduct if the Commission determined that the telecommunications carrier was knowingly impeding the development of competition in a telecommunications service market. (220 ILCS § 5/13-514.) Significantly, the legislature did not limit the Commission's jurisdiction over telecommunications carriers engaging in such improper conduct to circumstances in which a carrier is not providing service pursuant to the terms of a contract. (220 ILCS § 5/13-514.) On the contrary, the legislature expressly contemplated that the Commission would exercise its Section 13-514 authority in circumstances where a carrier is providing service under a competitive contract. (220 ILCS § 5/13-514(8).)

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. (See 220 ILCS § 5/13-514; Pr. Ex. 2 at 15-15, lines 698-738; Cane, 1/17/01 Tr. at 92-94, 162-64; Pr. Int. Br. at 30-35.) PrimeCo supplied evidence regarding this issue to underscore the importance of PrimeCo's right to obtain relief under Section 13-514 of the Act.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].

As indicated above, the preponderance of the evidence in the record shows that

[REDACTED].

(Pr. Ex. 2 at 15-16, lines 713-17, 727-38; Cane, 1/17/01 Tr. at 92-94, 162-64.)

[REDACTED]

[REDACTED].

(Pr. Ex. 2 at 15-16, lines 727-38; Cane, 1/17/01 Tr. at 94.) [REDACTED]

[REDACTED]

[REDACTED].² (Pr. Ex. 2 at 16, lines 719-23; Cane 1/17/01 at 161-63.) [REDACTED]

[REDACTED]

² [REDACTED]

[REDACTED]. (Aron, 1/18/01, Tr. at 30.)

[REDACTED]

[REDACTED] (Pr. Ex. 5 at 5.)

[REDACTED]

[REDACTED] (Aron, 1/18/01 Tr.

at 372-75) [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. (See Aron, 1/18/01 Tr. at 388-89, 411-12, 421-25; Pr. Ex.

2 at 15, lines 698-703, 713-15; Cane, 1/17/01 Tr. at 92-93) [REDACTED]

[REDACTED] (see Aron, 1/18/01

Tr. at 412), [REDACTED]

[REDACTED]

[REDACTED]. (Pr. Ex. 2 at 15-16, lines 727-38; Cane, 1/17/01 Tr. at 92-94, 162-64.)

PrimeCo's evidence clearly refutes Aron's theoretical proposition.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (Am. Int. Br. at 29.) [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (Am. Int. Br. at 28.)

As set forth in Section 13-502 of the Act, a “competitive” service is a service that “for some identifiable class or group of customers in an exchange ... or some other clearly defined geographical area ... is reasonably available from more than one provider. ...” (220 ILCS § 5/13-502.)

In view of this statutory language, the fact that a service is competitive does not mean that *every* customer in the geographical area where the service is available from more than one provider can obtain the service at a reasonable cost. In fact, as expressly stated in Section 13-502, to be “competitive,” a service need only be reasonably available for an identifiable “class or group of customers,” not each and every customer within that “class or group.” (*Id.*) Accordingly, Section 13-502 should not be interpreted in the restrictive manner Ameritech suggests. (See *id.*; County of Knox v. Highlands, 188 Ill. 2d 546, 556, 723 N.E.2d 256, 263 (2000) (“it is never proper for a court to depart from plain language by reading into a statute exceptions, limitations, or conditions which conflict with the clearly expressed legislative intent”).)

Furthermore, the evidence PrimeCo presented in this proceeding shows that DS1 Service in Illinois, and more particularly within Ameritech’s Illinois service territory, is available from more than one provider. (See Pr. Ex. 2 at 15-16, lines 713-38; Cane, 1/17/01 Tr. at 76, 91-92.) Thus, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. Accordingly, the Commission should reject Ameritech’s contention that PrimeCo should be estopped from supporting its

complaint [REDACTED]

[REDACTED]. (Am. Int. Br. at 29.)³

2. PrimeCo's Complaint Is Not More Properly
Considered under Section 13-509 of the Act

PrimeCo and Ameritech entered into the 1998 Contract pursuant to Section 13-509 of the Act (PrimeCo Ex. 2-E at 1; Am. Int. Br. at 31), which provides:

a telecommunications carrier may negotiate with customers or prospective customers to provide competitive telecommunications service, and in so doing, may offer or agree to provide such service on such terms and for such rates or changes as are reasonable, without regard to any tariffs it may have filed with the Commission with respect to such services [T]he telecommunications carrier shall thereafter provide service according to the terms thereof, unless the Commission finds, after notice and hearing, that the continued provision of service pursuant to such contract or memorandum would substantially and adversely affect the financial integrity of the telecommunications carrier or would violate any other provision of this act.

(220 ILCS §5/13-509.) According to Ameritech, PrimeCo's Complaint should fail because PrimeCo could have "challenged the terms [of the 1998 Contract] under Section 13-509." (Ameritech Br. at 31 and 35.) This claim is clearly erroneous.

Section 13-509 merely provides the statutory authority pursuant to which telecommunications carriers may enter into competitive contracts. It does not require that all disputes relating to such contracts be considered under its terms. (Cf. 220 ILCS § 5/13-506.1(e) (the Commission is authorized to consider plans for alternative regulation of rates charged for competitive services under Section 13-506.1(e) of the Act).) Section 13-509 also does not authorize the Commission to enforce the terms of competitive contracts. To the contrary, Section 13-509 authorizes the Commission to

³ [REDACTED]

[REDACTED] (Supra at 7-8; Am. Int. Br. at 34.)

invalidate the terms of such contracts where: (i) a telecommunications carrier's continued adherence to the contract would have a substantial adverse effect upon its financial integrity (see Am. Int. Br. at 31-32 (citing Illinois Commerce Comm'n v. East St. Louis & C. Ry. Co., 361 Ill. 606, 198 N.E. 716 (1935)), or (ii) the telecommunications carrier's provision of service pursuant to the contract violates the Act. (220 ILCS § 5/13-509; Am. Int. Br. at 35; see County of Knox, 188 Ill. 2d at 553, 723 N.E. 2d at 261 ("an agency only has the authorization given to it by the legislature through the statutes").) Because PrimeCo's Complaint does not assert either of these types of claims, Ameritech cannot reasonably assert that the Complaint is more properly considered under Section 13-509. (See Am. Int. Br. at 35 ("PrimeCo has not argued ... that any term of the 1998 Contract violates any provision of the Act").)

Consequently, Ameritech's reliance on Rhythms Links Inc. v. Illinois Bell Tel., Docket No. 99-0465 (Dec. 2, 1999) (Am. Int. Br. at 11, 31), is misplaced. In that case, complainant Rhythms Links Inc. ("Rhythms") requested that the Commission exercise its authority under Sections 13-514 and 13-515 of the Act to order Ameritech to modify the terms of its collocation services tariff. (Id. at * 11-12.) The Commission denied Rhythms' complaint, stating that the relief Rhythms sought could not be granted under Sections 13-514 and 13-515 because "changes to the terms and conditions of a tariff can be reviewed only in the context of a Section 9-201 or 9-250 proceeding." (Id. at * 29-30.)

As set forth above, PrimeCo's complaint cannot properly be considered under Section 13-509. Therefore, Ameritech's analogy to Rhythms Links Inc. is entirely inapposite. Ameritech's reliance on MCImetro Access Trans. Serv., Inc. v. Illinois Bell Tel., Docket No. 99-0379 (Ill. C.C. Sept. 22, 1999), Slip. Op., is similarly unavailing.

In that case, a telecommunications carrier receiving service under a competitive contract sought to invoke the terms of a tariff to modify its contract. (Id. at 33.) PrimeCo is not seeking to modify the 1998 Contract based on Ameritech's special access tariff or on any other grounds. Further, [REDACTED]

[REDACTED]. (Am. Int. Br. at 4, 27.)

Finally, Ameritech's contention that PrimeCo's attempt in this proceeding "to impose a performance standard and a remedy would be in direct conflict to ... PrimeCo's obligations under Section 13-509" of the Act (Am. Int. Br. at 31 n.5), is frivolous, at best. As set forth above, Section 13-509 requires a telecommunications carrier that is *providing* service under a competitive contract to provide that service according to the terms of its contract. (220 ILCS § 5/13-509.) PrimeCo is not providing service pursuant to a competitive contract. Thus, this provision of Section 13-509 is not applicable to PrimeCo. It is, however, applicable to Ameritech, [REDACTED]

**B. PRIMECO SATISFIED ITS BURDEN OF PROVING
THAT AMERITECH IS KNOWINGLY IMPEDING
THE DEVELOPMENT OF COMPETITION
IN A TELECOMMUNICATIONS SERVICE MARKET**

The evidence in the record fully supports PrimeCo's claims. The evidence shows that [REDACTED]

[REDACTED]. (Pr. Ex. 2-E at §§ 13.3 - 13.5; Pr. Ex. 2 at 7, lines 328-47.) It shows that ever since the parties entered into the

1998 Contract, [REDACTED]
[REDACTED]. (Pr. Exs. 2-A, 2-B, 9, 11; see
Am. Int. Br. at 5, 10.) It shows that Ameritech repeatedly promised PrimeCo that it
would improve the quality of its DS1 Service. (Pr. Ex. 1 at 7-8, lines 324-84; Pr. Ex. 2
at 11, 14, lines 496-510, 647-58; Pr. Ex. 3 at 5, lines 213-17; Cane, 1/17/01 Tr. at
156-59, 169-70; Borner, 1/17/01 Tr. at 247.) It shows that as a result of Ameritech's
myriad promises, Ameritech implemented limited and inadequate performance
improvement initiatives -- most of which were not even specifically directed at
PrimeCo's DS1 Service problems -- that have failed to improve the overall quality of
Ameritech's DS1 Service [REDACTED]
[REDACTED].

(See Pr. Int. Br. at 14, 17, 19-25; Pr. Ex. 4 at 11-15; see generally Pr. Exs. 2-A, 2-B, 9;
see also 220 ILCS § 5/13-509 (a telecommunications carrier must provide service in
accordance with the terms of its contract).)

The evidence also shows that Ameritech is fully aware of the poor quality of its
DS1 Service and of the adverse impact its poor quality service has on PrimeCo's ability
to provide service to its customers. (Pr. Ex. 1 at 7-9, lines 324-430; Pr. Ex. 3 at 5,
lines 206-27.) It shows that although Ameritech has the technological wherewithal to
significantly improve the DS1 Service it provides to PrimeCo (Am. Ex. 3.0 at 4-5; see
Am. Int. Br. at 7) and [REDACTED]

██████████⁴ (Pr. Int. Br. at 18-19), Ameritech has failed to devote sufficient resources to PrimeCo's DS1 Service problems to resolve them. (Pr. Ex. 1 at 8-9, lines 394-401; Pr. Ex. 2-N; Pr. Ex. 3 at 6, lines 258-83; Pr. Ex. 9; see Am. Ex. 3.0 at 5, lines 11-13; Pr. Int. Br. at 19-25.)

Based on this evidence and the provisions of Section 13-514, the Commission can and should find that Ameritech unreasonably provided PrimeCo with inferior connections, unreasonably impaired the speed, quality, or efficiency of services used by PrimeCo, and unreasonably acted in a manner that has a substantial adverse effect on PrimeCo's ability to provide service to its customers. Moreover, because Section 13-514 of the Act defines such conduct as per se impediments to the development of competition and because Ameritech acted with knowledge, the Commission should find that PrimeCo is entitled to relief under Section 13-514 of the Act.

1. Ameritech Failed to Rebut the Presumption That It
Knowingly Is Impeding the Development of Competition

Section 13-515(c) of the Act states:

No complaint may be filed under this Section until the complainant has first notified the respondent of the alleged violation and offered the respondent 48 hours to correct the situation. *Provision of notice and the opportunity to correct the situation creates a rebuttable presumption of knowledge under Section 13-514.*

(220 ILCS § 5/13-515(c) (emphasis added).)

⁴ ██████████ (Am. Int. Br. at 14.)
██████████
██████████ (Pr. Exs. 2-A, 2-B, 9)
██████████ (Pr. Ex. 3 at 2, lines 61-63.)

By letter dated October 12, 2000, PrimeCo notified Ameritech that Ameritech was violating Section 13-514 of the Act by providing PrimeCo with unreasonably poor quality DS1 Service. (Complaint, Ex. A.) PrimeCo specifically noted Ameritech's poor performance through the twelve-month period ending August 31, 2000, and offered Ameritech 48 hours to correct the situation. (Complaint, Ex. A.) Through the date of hearing, which took place on January 17-18, 2001, Ameritech had failed to correct the violations described in PrimeCo's October 12, 2000 letter. (Pr. Ex. 1 at 9, lines 429-30.) [REDACTED]

(Pr. Ex. 1 at 5, lines 243-46; Devine, 1/17/01 Tr. at 300-01), [REDACTED]
[REDACTED]
[REDACTED]

[REDACTED].⁵ (Pr. Ex. 9.) Under Section 13-515(c), these facts give rise to a rebuttable presumption that Ameritech acted "knowingly."

The evidence showing that Ameritech long had knowledge of the pertinent facts -- that its DS1 Service continuously failed to satisfy even minimum performance standards -- makes this presumption irrefutable. Ameritech's own monthly performance reports show that Ameritech DS1 Service has failed to satisfy reasonable minimum performance standards ever since the parties entered into the 1998 Contract. (Pr. Exs. 2-A, 2-B, 9, 11.) PrimeCo also presented evidence regarding the countless meetings it had with Ameritech, in-person and by telephone conference, where the parties discussed the poor quality of Ameritech's DS1 Service, Ameritech's duty to improve its performance, and the inadequacy of Ameritech's various

5 [REDACTED]
[REDACTED] (Pr. Ex. 9.)

“performance improvement” initiatives. (Pr. Ex. 1 at 7-8, lines 324-84; Pr. Ex. 3 at 5, lines 213-27.)

Accordingly, the preponderance of the evidence in the record clearly shows that Ameritech acted “knowingly,” particularly in light of the statutory presumption created by PrimeCo’s October 12, 2000 letter sent in compliance with Section 13-515(c) of the Act and Ameritech’s subsequent failure to correct its violations of Section 13-514. (Supra at 17.)

2. PrimeCo Established That Ameritech’s Conduct Violates the
Per Se Provisions of Section 13-514

Section 13-514 of the Act in relevant part states:

A telecommunications carrier shall not knowingly impede the development of competition in any telecommunications service market. The following prohibited actions are considered per se impediments to the development of competition

(1) unreasonably refusing or delaying interconnections or providing inferior connections to another telecommunications carrier;

(2) unreasonably impairing the speed, quality, or efficiency of services used by another telecommunications carrier; [and]

(6) unreasonably acting or failing to act in a manner that has a substantial adverse effect on the ability of another telecommunications carrier to provide service to its customers;...

(220 ILCS § 5/13-514 (1), (2), (6).)

Based on the express language of Section 13-514, PrimeCo’s proof of the fact that Ameritech engaged in any one or more of the above actions gives rise to an irrebuttable presumption that Ameritech impeded the development of competition in the Illinois telecommunications service market in which Ameritech provides PrimeCo with DS1 Service. (See 21st Century Telecom v. Illinois Bell Tel. Co., ICC No. 00-0219, 2000 WL 1344506 at * 30 (once wrongful conduct is proven, the consequences of that

conduct are presumed).) Stated otherwise, such conduct is a per se impediment to the development of competition.

Regarding per se anticompetitive conduct, the court in Gilbert's Ethan Allen Gallery v. Ethan Allen, Inc., 162 Ill. 2d 99, 105, 642 N.E.2d 470, 473 (1994) (quoting Business Elec. Copr. v. Shard Elec. Corp., 485 U. S. 717, 723 (1988) and Maprese v. American Academy, 692 F.2d 1083, 1093 (1982) (emphasis added)) stated:

'per se rules are appropriate only for "conduct that is manifestly anticompetitive," [citation] that is, conduct "that would always or almost always tend to restrict competition" . . . If a practice is within the per se category, all you have to prove to establish a violation is that the defendant engaged in the practice; *you do not have to show that in fact the practice has had or will have an adverse effect on competition.*'

(See Panzella v. River Trails School Dist. 26, 313 Ill. App. 3d 527, 729 N.E.2d 954, 960 (1st Dist. 2000) (teacher's dismissal was presumed to be for cause where school district based dismissal on conduct statute defined as per se cause for termination; school district was not required independently to prove conduct giving rise to termination satisfied the for cause requirement); People v. Daniel, 311 Ill. App. 3d 276, 285, 723 N.E.2d 1279, 1288 (2nd Dist. 2000) (because handguns are included in the statutory list of per se dangerous weapons, court presumed that defendant's threat to use a pistol was a threat to use a dangerous weapon even though no witness observed the pistol and the pistol was not displayed, produced at trial, or recovered).)

The evidence in the record shows that Ameritech's provision of unreasonably poor quality DS1 Service satisfies the requirements of each of the above-quoted Section 13-514 categories of per se impediments to the development of competition. The evidence shows that: (1) Ameritech provides PrimeCo with "inferior connections" by failing to provide PrimeCo with DS1 Service that satisfies reasonable minimum performance standards (Pr. Ex. 1 at 5, lines 219-26; Pr. Ex. 2 at 2, lines 53-98; Pr. Ex.

3 at 2-4, lines 67-184; Pr. Int. Br. at 14-17, 25);⁶ (2) Ameritech's provision of poor quality DS1 Service impairs the quality, or efficiency of services used by PrimeCo (Pr. Ex. 1 at 6-7, lines 256-319; Pr. Ex. 2 at 10, lines 469-78; Pr. Ex. 5 at 3-4, lines 144-68; Pr. Int. Br. at 26); and (3) Ameritech's conduct has a substantial adverse effect on PrimeCo's ability to provide service to its customers. (Pr. Ex. 1 at 6, lines 272-78; Pr. Ex. 3 at 6-7, lines 295-312; Pr. Ex. 5 at 4, lines 173-92; Pr. Int. Br. at 26-28.)

The evidence also shows that although Ameritech is capable of providing PrimeCo with better quality DS1 Service (supra at 15), Ameritech has failed to do so, despite its statutory [REDACTED] obligations and its repeated promises to improve its performance. (Pr. Ex. 2-E at §§ 13.3 and 13.5; Pr. Int. Br. at 26; 220 ILCS § 5/13-509.) Thus, Ameritech's failure to provide PrimeCo with adequate DS1 Service is unreasonable.

Ameritech's attempt to refute this conclusion with long discussions about various initiatives it has undertaken to try to improve its performance (see Am. Int. Br. at 2-10, 20) fails. Ameritech's own performance reports show that its initiatives have been woefully inadequate, and have had no material impact on the quality of the DS1 Service Ameritech provides to PrimeCo. (Pr. Exs. 2A, 2B, 9) Moreover, the evidence in the record shows that the majority of Ameritech's initiatives are not intended to

⁶ Ignoring the evidence in the record, Ameritech asserts that PrimeCo "provided ... no independent standards" by which this Commission can evaluate Ameritech's DS1 Service. (Am. Br. at 19-20.) This assertion is false. [REDACTED]

[REDACTED] (Pr. Ex. 2-C at 1; Pr. Ex. 2-E at § 13; see also Pr. Exs. 2-J, 2-K at 1; Pr. Ex. 2-L at PC00046-49.) [REDACTED]

improve Ameritech's poorly performing network plant but rather to address outages *after* they occur. (Pr. Int. Br. at 23)

Accordingly, PrimeCo satisfied its burden of proving that Ameritech engaged in conduct the Act characterizes as a per se impediment to the development of competition. Therefore, PrimeCo is not obligated to provide independent evidence sufficient to support the conclusion that Ameritech's provision of substandard DS1 Service does in fact impede the development of competition. (See Gilbert's Ethan Allen Gallery, 162 Ill. 2d at 105, 642 N.E.2d at 473.)

Similarly, it is not necessary for PrimeCo to provide any further proof of the "telecommunications service market" being adversely affected by Ameritech's unreasonable conduct. By establishing that Ameritech unreasonably provided PrimeCo with poor quality DS1 Service in PrimeCo's Illinois service territory, PrimeCo established that its Illinois service territory is the "telecommunications service market" in which Ameritech's unreasonable conduct is impeding the development of competition.

Further, it would not be reasonable to interpret Section 13-514 as, on the one hand, authorizing the Commission to presume that Ameritech impeded the development of competition by unreasonably providing PrimeCo with "inferior connections," "unreasonably impairing the speed, quality, or efficiency of services used by [PrimeCo]" or "unreasonably acting ... in a manner that has a substantial adverse effect on the ability of [PrimeCo] to provide service to its customers," but, on the other hand, not authorizing the Commission to include in that presumption that the telecommunications service market in which Ameritech adversely impeded the development of competition is the same service market in which Ameritech engaged in

its unreasonable conduct. (See City of East St. Louis v. East St. Louis Financial Adv. Auth., 188 Ill. 2d 474, 480 and 484, 722 N.E.2d 1129, 1132 and 1134 (1999) (the meaning attributed to a statute must give effect to the legislative intent revealed by the words of the statute, thus, court refused to construe statute in strained manner proposed by defendant).) Thus, PrimeCo established that the telecommunications service market in which Ameritech impedes competition is the Illinois wireless telecommunications service market including the Chicagoland area.

It similarly is unreasonable for Ameritech to argue that PrimeCo has not proven its case because PrimeCo's evidence "address[es] Ameritech Illinois' actions towards PrimeCo alone." (Am. Int. Br. at 12.) Section 13-514 expressly authorizes a person harmed by the unreasonable actions of a telecommunications carrier to state a claim against that carrier, and recover relief, by proving that it received unreasonably poor service from that carrier. (220 ILCS § 5/13-514(1)-(8).) On this point, the language of Section 13-514 cannot be more clear.

Ameritech also attempts to defeat PrimeCo's Complaint by arguing that PrimeCo must prove that Ameritech discriminated against PrimeCo. (Am. Int. Br. at 12-13 ("in a Complaint such as PrimeCo's, based on alleged discrimination in the quality of service which a telecommunications carrier provides to different customers, the complainant must prove that the respondent intentionally discriminated against it"), at 20 ("[REDACTED]
[REDACTED]
[REDACTED]")) and generally at 12-20.)

Accordingly, Ameritech argues, to satisfy its burden of proof, "PrimeCo must rely on the difference between the service that Ameritech Illinois provides PrimeCo and

the service that Ameritech Illinois provides all wireless customers as a group,” which purportedly would make the “evidence of the relative performance of PrimeCo’s DS1 service to that that [sic] of all wireless carriers ... far more relevant than [sic] the performance of PrimeCo’s DS1 service considered alone.” (Am. Int. Br. at 13.)

Ameritech’s argument is contrary to Illinois law. (220 ILCS § 5/13-514; 21st Century Telecom, 2000 WL 1344506 at * 23.) Accordingly, the Commission should reject it. To prove that a telecommunications carrier is impeding the development of competition in a telecommunications service market, a complaining party need only prove that the conduct of the respondent telecommunications carrier is unreasonable. (220 ILCS § 5/13-514; 21st Century Telecom, ICC No. 00-0219, 2000 WL 1344506 at * 23 (“Each of the prohibited actions listed in Section 13-514 is prefaced with the term ‘unreasonably’ It must also be alleged and shown that the particular transgression was unreasonable in light of all the relevant surrounding circumstances.”).⁷ Thus, PrimeCo does not have to prove that Ameritech engaged in improper discrimination, *i.e.*, “the act or practice on the part of a common carrier of discriminating (as in the imposition of tariffs) between persons, localities, or commodities in respect to substantially the same service.” (Webster’s Third New Int’l Dictionary at 648 (1961); *see County of Knox*, 188 Ill. 2d at 556, 723 N.E.2d at 263 (to determine plain meaning of statute, court relied on dictionary definitions of the words used therein).) Instead, PrimeCo only had to prove that Ameritech’s provision of DS1 Service was unreasonable, *i.e.*, that it evinced Ameritech’s “indifference to ... appropriate conduct

⁷ Ameritech’s contention that 21st Century Telecom supports the proposition that PrimeCo must prove that Ameritech discriminated against it is untenable. (Am. Int. Br. at 20.) In that case, the Commission denied relief under Section 13-514 based on the complainant’s failure to prove discrimination because complainant’s theory of the case was that Ameritech had discriminated against it. (*Id.* at * 25-27.) PrimeCo’s Complaint is not based on discrimination. It is based on Ameritech’s knowing and *unreasonable* provision of poor quality DS1 Service. Accordingly, PrimeCo does not have to prove discrimination.

exceeding the bounds of reason.” (Webster’s Third New Int’l Dictionary at 2507 (1961).) PrimeCo met this burden [REDACTED]

[REDACTED].

The record evidence showing that [REDACTED] is further proof that Ameritech’s conduct is unreasonable. It dispositively shows that Ameritech can and does provide better quality DS1 Service than the DS1 Service it provides to PrimeCo. (Pr. Int. Br. at 18-19.)

Ameritech also erroneously asserts that PrimeCo must prove that Ameritech engaged in unreasonable conduct “*for the purpose*” of knowingly impeding the development of competition. (Am. In. Br. at 11, 24 (emphasis added).) In other words, Ameritech contends that PrimeCo must prove intent. (Am. Int. Br. at 13, 24.) Review of Section 13-514 shows that the Act does not include the intent element Ameritech indicates, and no such intent element may be implied therein. (See 220 ILCS §5/13-514; County of Knox, 188 Ill. 2d at 566, 723 N.E.2d at 263.) Thus, PrimeCo is not required to prove that Ameritech *intended* to knowingly impede the development of competition. PrimeCo need only prove, as it has, that Ameritech impeded the development of competition knowingly, which Ameritech may have intended to do or may have done unwittingly.

3. The Evidence in the Record Independently
Shows That Ameritech’s Conduct
Impedes the Development of Competition
in a Telecommunications Service Market

In addition to satisfying the per se provisions of Section 13-514, the preponderance of the evidence in the record independently supports the conclusion that Ameritech, by providing PrimeCo with unreasonably poor quality DS1 Service, is

impeding the development of competition in the Illinois wireless telecommunications service market in which Ameritech supplies PrimeCo with DS1 Service.

As PrimeCo witnesses explained, the failure of an Ameritech DS1 circuit prevents PrimeCo's cell sites from being able to communicate with PrimeCo's mobile switching center. (Pr. Ex. 1 at 5, lines 201-02; Cane, 1/17/01.) Accordingly, when a DS1 circuit fails, telephone calls being transmitted by the circuit will be dropped, unless the signal from the customer's handset is picked up by an alternate cell site. (Pr. Ex. 1 at 5, lines 201-06; Cane, 1/17/01 Tr. at 97-101.) However, even when a telephone call is picked up by another cell site, the quality of the call may be impaired. (Pr. Ex. 1 at 5, lines 206-210; Pr. Ex. 5 at 3-4, lines 144-52; Cane, 1/17/01 Tr. at 101.) Further, if a customer is outside the range of an alternate cell site, the customer will be unable to place or receive calls. (Pr. Ex. 1 at 5, lines 203-206; Pr. Ex. 3 at 7, lines 305-12; Cane, 1/17/01 Tr. at 102.) Finally, due to the interrelation of the cell sites comprising PrimeCo's network, DS1 circuit failures necessarily have an adverse impact on PrimeCo's network. (Cane, 1/17/01, Tr. at 106-09.)

Also, PrimeCo provided evidence showing that [REDACTED] of the cell site outages experienced on its network are caused by the failure of Ameritech DS1 circuits. (Pr. Ex. 1 at 6, lines 283-86; Pr. Ex. 1-C; see Pr. Ex. 3 at 5, lines 206-09; Pr. Ex. 5 at 4-5, lines 199-204.) Accordingly, it reasonably can be deduced that the poor quality of Ameritech's DS1 Service impairs PrimeCo's ability to provide high-quality service to its customers and thereby impedes PrimeCo's ability to compete in Illinois' wireless telecommunications service market. (Pr. Ex. 5 at 5, lines 219-26.) As a regional service provider, PrimeCo can effectively compete against the national

providers in the Chicago market only by providing high-quality wireless service. (Pr. Ex. 5 at 3, lines 101-10.)

The evidence in the record further establishes that Ameritech's DS1 circuit outages adversely affect PrimeCo's network. (Supra at 25.) In addition, PrimeCo loses revenue when calls are dropped and when its customers are unable to originate calls. (Id.; Cane, 1/17/01 Tr. at 95.) PrimeCo incurs additional expense to provide reliable service to its customers. (Pr. Ex. 1 at 6, lines 256-68; Pr. Ex. 2 at 10-11, lines 486-89.) PrimeCo incurs additional marketing costs to retain and attract new customers. (Pr. Ex. 5 at 4, lines 197-200.) This evidence constitutes further independent support for PrimeCo's claim that Ameritech's DS1 Service adversely affects PrimeCo's ability to effectively and efficiently compete. Combined with the evidence showing that Ameritech is aware of the adverse impact of its provision of substandard DS1 Service to PrimeCo and that Ameritech has the technical capability to improve its DS1 Service, this evidence shows that Ameritech is knowingly impeding the development of competition in the telecommunications service market in which it provides service to PrimeCo. (Pr. Ex. 5 at 5, lines 219-24.)

In an attempt to refute this evidence, Ameritech asserts that its DS1 Service performance, if viewed in terms of "availability," is not so bad. In particular, Ameritech argues that PrimeCo "has blown out of all perspective its claim related to the percentage unavailability levels for Ameritech Illinois' [DS1] service" by illustrating the unavailability of Ameritech's DS1 Service on a scale of 12/100th's of a percent. (Am. Int. Br. at 19; see Am. Int. Br. at 21; Cane, 1/17/01 Tr. at 134.) [REDACTED]

[REDACTED]

[REDACTED]. (Am.

Int. Br. at 23 [REDACTED]");
Pr.Ex. 2-E at §§ 13.3 – 13.5.) Thus, “availability” is not the proper basis on which to
evaluate Ameritech’s performance.⁸

Also, Ameritech’s assertion that [REDACTED]
[REDACTED]
[REDACTED] (Am. Int. Br. at 23-24
n.3), [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]. (See Pr. Int. Br. at 37-38.)

Finally, certain of Ameritech’s claims should be rejected because they are
improperly based on mischaracterizations of the evidence in the record. (See 220 ILCS
§ 5/10-103 (the Commission is required to base its decisions solely on the record).)
For example, Ameritech states, “PrimeCo itself concluded that Ameritech Illinois met
its obligation to maintain the DS1 facilities used to provide DS1 Service to PrimeCo.”
(Am. Int. Br. at 19.) Then, citing the testimony of PrimeCo witness Richard M. Cane
(“Cane”), Ameritech lists various types of repair and maintenance work supposedly
performed by Ameritech. (Id.) The repair and maintenance work Cane was describing,
however, is work that is performed by PrimeCo, not Ameritech. (Pr. Ex. 1 at 7, lines
301-02; Am. Ex. 7.) Ameritech also asserts, “Mr. Cane admitted that PrimeCo has no

⁸ Ameritech’s additional contention that as compared to the annual “availability” of
PrimeCo’s network, the annual unavailability of Ameritech’s DS1 circuits is small, is nothing
more than a restatement of Ameritech’s erroneous contention that this Commission should
focus on availability. (Am. Int. Br. at 23.)

evidence as to how customers are impacted” by Ameritech DS1 circuit outages. (Am. Int. Br. at 21.) Besides being false (Pr. Ex. 1 at 5, lines 201-14; Pr. Ex. 2 at 10-11, lines 469-89; Pr. Ex. 5 at 3-4, lines 144-59; Cane, 1/17/01 Tr. at 99-108; supra at 25), this assertion misstates the testimony Ameritech cites to support it. In that testimony, Cane explained that PrimeCo cannot determine the number of calls that are lost or the number of calls that cannot be originated as a result of Ameritech DS1 circuit failures because those failures prevents PrimeCo’s cell sites from communicating with PrimeCo’s switch. (Cane, 1/17/01 Tr. at 95-96, 109-110.)

C. BASED ON AMERITECH’S PER SE VIOLATIONS OF SECTION 13-514, THE COMMISSION SHOULD GRANT PRIMECO’S REQUEST FOR RELIEF AND ASSESS AMERITECH WITH 100% OF THE COSTS

Section 13-515(d)(7) of the Act in pertinent part provides that the decision entered after hearing on a Section 13-514 complaint “shall include reasons for the disposition of the complaint and, if a violation of Section 13-514 is found, directions and a deadline for correction of the violation.” (220 ILCS §5/13-515(d)(7).) Section 13-515(d)(8) states, “the Commission shall decide to adopt the decision ... or shall issue its own final order.” (220 ILCS § 5/13-514(d)(8).) Accordingly, based on the evidence establishing Ameritech’s violation of Section 13-514 of the Act, and Ameritech’s failure to refute that evidence by proving that it did not act knowingly or that it did not act unreasonably, the Commission should grant PrimeCo’s Complaint and enter an appropriate order.

As explained in PrimeCo’s Initial Brief, [REDACTED]
[REDACTED]
[REDACTED], the Commission is authorized to direct Ameritech to provide PrimeCo with DS1 Service that satisfies [REDACTED] performance standards.

However, [REDACTED]
[REDACTED]

PrimeCo proposes that the Commission require Ameritech to provide it with DS1 Service that satisfies [REDACTED] performance standards expressed in terms consistent with Ameritech's customary tracking and reporting procedures. (Pr. Int. Br. 36-39.) Specifically, PrimeCo proposes that the Commission order Ameritech to comply with the following reasonable performance standards by October 1, 2001:
[REDACTED]
[REDACTED]

(Id.)

PrimeCo further requests that the Commission direct Ameritech to provide PrimeCo and the Commission's Staff with a plan describing the specific actions Ameritech will take to satisfy the proposed performance standards, the expected results of each of those actions, and the date(s) on which each action will be taken ("Action Plan"). Ameritech should be required to submit its Action Plan within twenty-one days of the date on which the Commission enters its order in this Docket, and PrimeCo should be permitted an opportunity to respond to Ameritech's Action Plan within ten days of PrimeCo's receipt thereof. Following Ameritech's receipt of any response PrimeCo may make, the parties should engage in a good faith effort to resolve any differences. If a resolution cannot be reached, either party should have the right to file a request for Commission review of Ameritech's Action Plan in this Docket.

The Commission also should direct Ameritech to provide PrimeCo and the Commission's Staff with a monthly report regarding the status of Ameritech's implementation of its Action Plan as well as monthly performance results for Ameritech's DS1 Service to PrimeCo in Illinois that measure unavailability and failure

rate. Ameritech should further be required to make the data on which its monthly performance results are based available for review by the Commission's Staff or PrimeCo upon request.

Finally, as mandated in Section 13-515(g) of the Act, if the Commission grants PrimeCo's Complaint, the Commission should assess 100% of its costs against Ameritech.

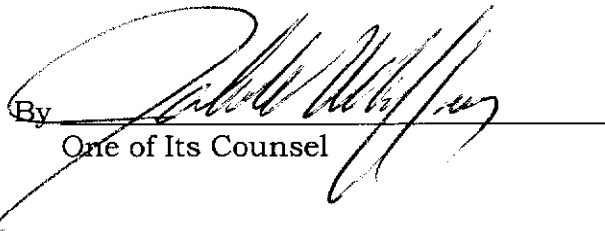
III. CONCLUSION

For the reasons stated herein and in PrimeCo's Initial Brief, and for the reasons appearing of record in this Docket, PrimeCo Personal Communications respectfully requests that the Commission enter findings consistent with the evidence in the record and enter an order directing Ameritech to correct its violations of Section 13-514 of the Act on or before October 1, 2001, by providing PrimeCo with DS1 Service that satisfies the reasonable performance standards PrimeCo proposed herein.

Dated: February 14, 2001

Respectfully submitted,

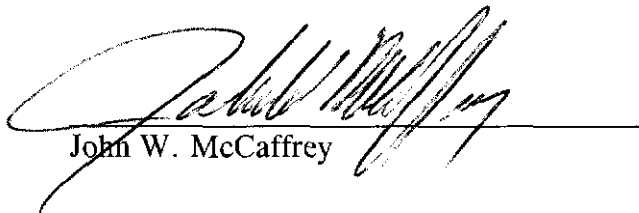
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PROOF OF SERVICE

I, John W. McCaffrey, one of counsel to PrimeCo Personal Communications, hereby certify that copies of the foregoing Redacted Reply Brief of PrimeCo Personal Communications was filed by Federal Express and copies were served on each of the persons on the attached Service List, at the addresses specified, by e-mail and in the manner indicated on the Service List, at Three First National Plaza, 70 W. Madison St., Chicago, Illinois 60602, on February 14, 2001.


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